

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Tiffany Dempsey	Team: Squad #14	CCRB Case #: 201505431	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Tuesday, 06/30/2015 7:50 PM	Location of Incident: In front of 43-43 Main Street	Precinct: 109	18 Mo. SOL 12/30/2016	EO SOL 12/30/2016	
Date/Time CV Reported Wed, 07/01/2015 3:02 PM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Wed, 07/01/2015 3:02 PM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Dominic Cappiello	13096	942764	109 PCT
2. POM Robert Cox	26280	948821	109 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Robert Cox	Abuse: PO Robert Cox stopped § 87(2)(b)	
B.POM Dominic Cappiello	Abuse: PO Dominic Cappiello stopped § 87(2)(b)	
C.POM Robert Cox	Abuse: PO Robert Cox searched § 87(2)(b)	
D.POM Dominic Cappiello	Abuse: PO Dominic Cappiello frisked § 87(2)(b)	
E.POM Dominic Cappiello	Abuse: PO Dominic Cappiello searched § 87(2)(b)	
F.POM Robert Cox	Abuse: PO Robert Cox frisked § 87(2)(b)	

Case Summary

On June 30, 2015, at approximately 7:50 p.m., PO Robert Cox and PO Dominic Cappiello of the 109th Precinct observed § 87(2)(b) running across Elder Avenue at the intersection of Elder Avenue and Main Street in Queens, and into Malik Grocery and Halal Meat located at 43-43 Main Street. Once § 87(2)(b) exited the store, PO Cox and Cappiello stopped him (**Allegations A and B**). PO Cox then searched and frisked § 87(2)(b) while PO Cappiello frisked him and allegedly searched him as well (**Allegations C, D, E, and F**). § 87(2)(b) was neither summonsed nor arrested in regards.

Due to the departure of Inv. Keyne Jean Villert, this case was reassigned to Inv. Tiffany Dempsey on July 21, 2015.

Mediation, Civil and Criminal History

- Although § 87(2)(b) initially accepted mediation, § 87(2)(b) later became uncooperative with the CCRB; therefore, this case was deemed unsuitable for mediation (See IAs).
- As of September 23, 2015, no Notice of Claim has been filed with NYC's comptroller's office in regards to the incident (Board Review 01).
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Civilian and Officer Histories

- This is the first complaint filed by or involving § 87(2)(b) (Board Review 02).
- PO Cox has been a member of service for five years and there are no prior CCRB allegations filed against him.
- PO Cappiello has been a member of service for nine years, and there are no prior substantiated allegations against him. In CCRB #201409053, a frisk allegation was pleaded against PO Cappiello; however, the allegation was closed as Victim Uncooperative.

Potential Issues

- § 87(2)(b) filed this complaint with the CCRB via telephone; however, after failing to contact the CCRB after five telephone calls, two letters, and two emails, § 87(2)(b) was considered uncooperative to participate in this investigation. Therefore, there is no verified statement (See IAs).
- Although there is no verified statement, video footage was obtained, which shows § 87(2)(b)'s interaction with officers (Board Review 03 and 4). The video does not contain audio. The relevant portion of the video is attached to IA 98, embedded in this report, and viewable through CTS Utilities as Board Review 04.



201505431_20150923_1421_DM.mp4

Findings and Recommendations

Allegations Not Pleaded

During his intake telephone call to the CCRB, § 87(2)(b) stated that PO Cappiello told him to shut the "eff" up; however, § 87(2)(b) did not clarify whether PO Cappiello stated the word "fuck," (See Initial CCRB Complaint (245)). Additionally there is no verified statement alleging that discourteous language was used, neither officer admitted to using discourteous language, and the video footage does not capture audio. § 87(2)(g)

Allegation A – Abuse of Authority: PO Robert Cox stopped § 87(2)(b)

Allegation B – Abuse of Authority: PO Dominic Cappiello stopped § 87(2)(b)

Allegation C – Abuse of Authority: PO Robert Cox searched § 87(2)(b)

Allegation D – Abuse of Authority: PO Dominic Cappiello frisked § 87(2)(b)

Allegation F – Abuse of Authority: PO Robert Cox frisked § 87(2)(b)

§ 87(2)(b) did not provide an in-person statement, but according to his initial complaint, he ran across the street and entered the store, while holding his pants up because he was not wearing a belt. Upon exiting, PO Cappiello and PO Cox told him not to move. PO Cox grabbed his arm and both officers searched him while asking if he had a gun (See Initial CCRB Complaint (245)).

Video footage shows § 87(2)(b) approach the store at a normal speed with his hands at his side. Once § 87(2)(b) exits the store, PO Cox and PO Cappiello simultaneously approach him. PO Cox physically stops § 87(2)(b) by grabbing his arm. PO Cox lifts up § 87(2)(b)'s shirt while PO Cappiello frisks his front waistband and front and back pants pockets. PO Cox removes § 87(2)(b)'s hat from his head, and looks and feels inside it. PO Cox frisks § 87(2)(b)'s front side, including both pants pockets, then walks behind § 87(2)(b) and frisks his left back pocket and waistband.

PO Cox and PO Cappiello both testified (Board Review 05 and 06) that the intersection of Elder Avenue and Main Street is known for robberies and contains heavy traffic. PO Cox and PO Cappiello recognized § 87(2)(b) from a prior robbery arrest executed by the 109th Precinct Anti-Crime team; however, neither recalled if weapons had been involved and neither knew of any other prior arrests involving § 87(2)(b).

PO Cappiello said he observed § 87(2)(b) standing, stationary, at the intersection, looking left to right, and grabbing his waistband while waiting to cross the street. PO Cox and PO Cappiello both saw § 87(2)(b) run across the street and into the store while holding his front waistband where there was a bulge, and look from left to right. PO Cappiello initially said the bulge was “a little bump, probably,” but later clarified that he could not describe its size and shape. Neither could PO Cox. Both officers believed the bulge was a weapon and suspected § 87(2)(b) to be in violation of criminal possession of a weapon, but neither officer suspected him of any other crime or offense at any point. PO Cappiello believed the bulge was a weapon because § 87(2)(b) was a recidivist and was present in a robbery prone location. He did not believe it to be any specific weapon. Besides moving his hands at his waistband as if he was moving an object and being present at a robbery-prone location, nothing about § 87(2)(b) or his behavior concerned PO Cappiello. PO Cappiello was not aware of whether § 87(2)(b) had noticed the officers prior to him entering the store. PO Cox believed the bulge was specifically a knife or gun because people are known to carry knives and guns in that area and because § 87(2)(b) had been previously been arrested for robbery near that location. The only furtive movement that PO Cox recalled § 87(2)(b) making was looking left to right. PO Cox said that § 87(2)(b) looking left to right while running indicated that he was nervous about holding a weapon.

Both officers testified that they both made the decision to stop § 87(2)(b) before he had entered the store. PO Cox said both officers also made the decision to frisk him. Neither officer recalled whether they observed a bulge on § 87(2)(b)'s body after he exited the store, but PO Cox said he still suspected § 87(2)(b) of having a weapon and frisked the front waistband where the bulge had been observed previously. He did not recall if he frisked anywhere else. PO Cox did not feel any object inside of § 87(2)(b)'s waistband. PO Cox initially said that even after § 87(2)(b) exited, he did not suspect the weapon to be located anywhere other than his waistband; however, after viewing the video, PO Cox said the officers could not see § 87(2)(b) while he was in the store, and thus, did not know if § 87(2)(b) had gotten rid of the weapon or moved it elsewhere on his person. Initially, PO Cox said he did not search § 87(2)(b) did

not believe he lifted his shirt, and did not recall if he removed and searched his hat. However, after viewing the video, PO Cox said he did not recall whether he intentionally lifted § 87(2)(b)'s shirt or if his hand got stuck on the shirt during the frisk. Also after viewing the video, PO Cox said he had no independent recollection of searching the hat, but that he searched the hat because § 87(2)(b) could have had a knife inside the hat. PO Cox had no independent recollection of § 87(2)(b) being frisked a second time, but explained that § 87(2)(b) was frisked a second time because officers often miss finding guns and knives during an initial frisk.

The officers could not recall if they still saw a bulge on § 87(2)(b) after he exited, but PO Cappiello said the officers could see § 87(2)(b) while he was in the store and saw that he did not make any movements. Accordingly, PO Cappiello believed § 87(2)(b) still had a weapon when he exited the store. PO Capiello did not recall which officer frisked § 87(2)(b)'s waistband; therefore, he did not provide a justification as to why he frisked § 87(2)(b). No object was felt during the frisk. Initially PO Cappiello stated that no officer frisked or searched § 87(2)(b)'s pockets, lifted § 87(2)(b)'s shirt, or removed and searched his hat. After viewing the video, PO Cappiello said that from where he was positioned, he did not see PO Cox lift § 87(2)(b)'s shirt, search his hat, or frisk him a second time. Neither officer determined what had caused the bulge. PO Cappiello did not recall if the officers asked § 87(2)(b) if he had a weapon.

The Stop, Question and Frisk Report prepared by PO Cox stated that § 87(2)(b) made furtive movements while running and holding his waistband, and changed directions at the sight of the officers. § 87(2)(b) was frisked due to the officers' knowledge of § 87(2)(b)'s prior criminal behavior and the furtive movements he made. The report also states that § 87(2)(b) was not searched (Board Review 07 and 10).

An officer may stop a person when he has reasonable suspicion that the person has committed, is committing or is about to commit a felony or misdemeanor. The officer may frisk the individual if he reasonably suspects the person is armed and dangerous. The officer may search the individual if the frisk reveals an object that he reasonably suspects is a weapon. Innocuous behavior alone does not generate a founded or reasonable suspicion that a crime is at hand. People v De Bour, 40 N.Y.2d 210 (1976). Nervousness is of limited significance in determining reasonable suspicion. In order for a bulge to justify a frisk, the bulge's size, shape, and placement must create reasonable suspicion that the bulge is a weapon. US v. Jackson, No. 15-CR-106 (JPO) (S.D.N.Y. July 29, 2015) Unidentifiable or amorphous bulges, even in the waistband area, have repeatedly been held to be an insufficient basis for a frisk. People v. Stevenson, 779 N.Y.S.2d 448 (2nd Dept. – 2004) (Board Review 08)

A person in a high crime area, early in the morning, with a bulge in his pocket creating a weighted down appearance, who changes course after noticing officers, blades his body as officers approach, and attempts to block an officer's hand from feeling the bulge, only provides founded suspicion and, even in its totality, does not create reasonable suspicion. People v. Gerard, 942 N.Y.S.2d 112 (1st Dept. 2012) (Board Review 09)

§ 87(2)(g)

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§ 87(2)(g)

Allegation E – Abuse of Authority: PO Dominic Cappiello searched § 87(2)(b)

§ 87(2)(b) alleged that PO Cappiello reached into his pants pockets, pants and shirt, while searching him. Meanwhile, PO Cappiello denied that any officer lifted § 87(2)(b)'s shirt or placed his hands inside § 87(2)(b)'s pants' pockets. PO Cox did not recall whether PO Cappiello searched § 87(2)(b) and said the officers did not initially intend to search § 87(2)(b)

The video shows PO Cappiello standing behind § 87(2)(b) frisking his waistband, front pant pockets, and the back of his thighs. However, § 87(2)(b)'s backside is not visible on the video; therefore, it does not show whether PO Capture searched § 87(2)(b)'s back, the back of his waistband, or his back pants

pockets.

§ 87(2)(g)

Squad: 14

Investigator: _____
Signature Print Date

Pod Leader: _____
Title/Signature Print Date

Attorney: _____
Title/Signature Print Date